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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 441

CAMILLO CHARLES LOMBARDOZZI, GEORGE LOMBARDOZZI, JOHN JOSEPH LOMBARDOZZI, DANIEL JOSEPH MARINO, AND MICHAEL JOSEPH ZAMPELLO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Vol. II, 240–246; Pet. App. 45–51) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1964 (Vol. II, 247). The petition for a writ of certiorari was filed on August 31, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether knowledge of the official character of an officer is a necessary element of the offense of assault upon a federal officer engaged in the performance of official duties.

2. Whether the evidence supports the conviction.

3. Whether various rulings made by the court during the course of the trial were proper.

4. Whether a portion of the prosecutor's closing argument was improper.

STATUTE INVOLVED

Section 111 of Title 18, U.S.C., provides, in pertinent part:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

STATEMENT

A one-count indictment returned in the United States District Court for the Eastern District of New York charged the petitioners and a co-defendant with having forcibly assaulted, impeded and interfered with F.B.I. Agent John Foley while he was engaged in the performance of official duties, in violation of 18 U.S.C. 111 (see Vol. I, 55). After a trial by jury, petitioners were found guilty as charged.[1] On Janu-

[1] Co-defendant Anthony Lombardozzi was acquitted.

ary 24, 1964, each was sentenced to imprisonment for twenty months (see Vol. I, 1). On appeal, the convictions were unanimously affirmed (Vol. II, 240–246, 247; Pet. App. 45–51).

The pertinent facts may be summarized as follows:

1. On the morning of April 3, 1963, F.B.I. agents were assigned to be present at the funeral of one Carmelo Lombardozzi to make a surveillance of those attending the event (Vol. II, 11, 21, 23, 148–149, 160). The agents drove to the vicinity of a Catholic Church in Brooklyn, left their automobiles and separated (Vol. I, 11; Vol. II, 25). Agent Foley was carrying a brief case with a "robot" camera concealed inside (Vol. I, 10–11; Vol. II, 13, 23–24, 37, 39). Three other agents were also carrying concealed cameras (Vol. II, 13, 149–150, 162).

As the Lombardozzi funeral procession drove up to the church, one of the agents noticed that almost everyone in the limousines was "peering" at him (Vol. II, 150). When the limousine in which petitioners Camillo Lombardozzi, Marino and Zampello were riding came to a stop, Camillo Lombardozzi said, "There's one of the rat bastards" (Vol. II, 41). As Marino was getting out of the automobile, he remarked to one of the agents, "Why don't some of you F.B.I. guys make pictures of your funeral?" (Vol. II, 162; see Vol. II, 151).

In the meantime, Agent Foley, who was observing people coming and going, snapped a picture of Carmine Lombardozzi (brother of three petitioners and uncle to two petitioners) and walked off (Vol. I, 10,

12; Vol. II, 26–27). Foley noticed that Zampello and another man kept staring at his brief case (Vol. II, 27–28). John Lombardozzi then rushed up and delivered a "terrific blow" to Foley's side (Vol. II, 29, 74, 130, 135–136, 146–147). Camillo Lombardozzi said, "You creep; you creep. What do you have to bother us" (Vol. II, 107, 115). Camillo then seized Foley's brief case and threw it into the churchyard (Vol. II, 107, 112–113, 152–153). As Foley turned for the brief case, Camillo struck him on the head (Vol. II, 108, 109, 113). Foley staggered and fell into the churchyard. All petitioners then commenced to punch, kick and beat Agent Foley (Vol. II, 87–90, 95, 108–111, 126–136, 154–156, 163–166; see Vol. II, 42, 74–76). As Foley attempted to regain his feet, Camillo Lombardozzi spun Foley "completely around" with a blow (Vol. II, 110). Camillo struck Foley "numerous times" on the head (Vol. II, 109, 113). In the meantime, John and George Lombardozzi and Zampello were striking Foley "with both hands as they came across" (Vol. II, 131, 132, 134–135, 155–156, 164–166). Marino "punched him, beat him, kicked him" (Vol. II, 131, 134–135). While Foley was on the ground, John Lombardozzi dropped to one knee and smashed "a couple of licks" into Foley's face (Vol. II, 166). John then picked up Foley's brief case and "pounded it down on the pickets" of a fence and "stomped" on it (Vol. II, 77–78, 80, 83, 84; see Vol. II, 24). At about that time, another F.B.I. agent ran to the area of the beating, drew his revolver and yelled, "Stop or I'll shoot" (Vol. II, 164). As Foley

was assisted to his feet, the crowd surrounding him "just disappeared" (Vol. II, 42, 164). Foley's revolver and credentials were missing (Vol. I, 12, 14; Vol. II, 30, 36–37, 157, 167).

Foley, who was bleeding about the head and face, had bruises on his arms and legs, cuts on his lips, chin, forehead and head, and suffered a compound depressed skull fracture (Vol. II, 16–17, 30–31, 32–33, 63, 65, 69, 71, 157, 167). He was taken to a nearby hospital where he underwent surgery for the skull fracture and survived (Vol. II, 32–33, 62–63, 66).

In the meantime, John Lombardozzi told an F.B.I. agent that he had been told that the missing revolver was located in the rear of the church (Vol. I, 6; Vol. II, 17, 168). The revolver was retrieved (Vol. I, 8) and, at the trial, was introduced into evidence over defense objections (Vol. I, 13–14).

2. In its instructions to the jury, the court charged, in part (Vol. I, 56, 57):

> If you find beyond a reasonable doubt that * * * Foley, while in the employ of the Federal Bureau of Investigation and engaged on account of his official duty was assaulted and that such assault was either committed by a defendant or that such defendant aided and abetted in the commission of the assault, then you should find such defendant guilty.
>
> If you find that Foley was not so employed and engaged or have a reasonable doubt thereof, you should find the defendants not guilty.
>
> * * * * *
>
> The government is not required to prove that the defendants or any of them had knowledge

> that Foley was so employed and engaged, and if in fact he was so employed and engaged, you should so find.

Petitioners objected to the last paragraph of this instruction (Vol. I, 61).

ARGUMENT

1. Petitioners argue that *scienter—i.e.*, knowledge of the official character of the federal employee—is an essential element of the offense and that the court therefore erred in charging that the government was not required to prove that fact. The statute imposes no such requirement. So far as material here, it merely provides that anyone who forcibly assaults an officer "while engaged in" the performance of his official duties shall be punished. Unjustified forcible assault can never be an innocent act; one who knowingly commits such an assault necessarily knows that he is committing a crime. Thus the question whether the person assaulted is or is not a federal officer does not go to the criminality of the act done; it goes to the question of which sovereignty shall try and punish the criminal act. It is entirely proper for the federal government to try a criminal assault upon its officer. One of the purposes of the statute was to make it unnecessary for the government to rely upon the courts of the States for the protection of its investigative and law enforcement personnel. S. Rep. No. 535, H. Rep. No. 145, 73d Cong. 2d Sess. It is the federal office of the person assaulted which properly gives federal jurisdiction over the crime.

There is no longer a conflict of circuits on this issue, although some older decisions may be contrary to the ruling below. In *Pettibone* v. *United States*, 148 U.S. 197, this Court, in holding that an indictment for conspiracy to obstruct justice in federal courts by violating an injunction must allege that defendants knew of the existence of a federal injunction, stated that an indictment against a person for corruptly endeavoring to influence or impede a witness or officer in a court of the United States in the discharge of his duty must charge notice on the part of the accused that the person sought to be influenced was indeed a witness or officer (148 U.S. at p. 206). At that time, there was no general statute punishing assaults upon federal officers. Aside from the obstruction of justice statute, federal law punished only resistance to specified officers in the discharge of their duties (18 U.S.C. (1934 ed.) 118, 33 Stat. 1265, 35 Stat. 1100). Resistance to performance of duty can be said to require knowledge of the duty.

In 1934, however, Congress enacted a statute (48 Stat 780) providing (in Section 1, 18 U.S.C. (1934 ed.) 253) for punishment of anyone who killed any specified officer of the United States "while engaged in the performance of his official duties, or on account of the performance of his official duties," and (in Section 2, 18 U.S.C. (1934 ed.) 254) for punishment of whoever "shall forcibly resist, oppose, impede, intimidate, or interfere" with such officer "while engaged in the performance of his official duties" or "shall assault him on account of the performance of his

official duties." Prior to 1948, the Sixth Circuit held, in a prosecution under the assault provision (Section 2), that *scienter* was an element of the offense. *Sparks* v. *United States*, 90 F. 2d 61. Later, however, without referring to *Sparks*, the same court held, in a prosecution under the killing provision (Section 1), that knowledge of the character of the employment was not a necessary element of the offense. *McNabb* v. *United States*, 123 F. 2d 848, reversed on other grounds, 318 U.S. 332. Under the wording of the statutes then in effect, the difference of result could perhaps be justified; for, while Section 1 applied whenever an officer was engaged "in the performance of his official duties," Section 2 was limited to assaults "on account of" the performance of official duties, a standard which requires reference to the defendant's purpose. See *Portnoy* v. *United States*, 316 F. 2d 486 (C.A. 1). This anomalous result was corrected by the 1948 revision of the Code which, in Section 111, combined former Sections 118 and 254, and enacted the statute in its present form. The reviser's notes state that the consolidation was made "with changes in phraseology and substance necessary to effect the consolidation." Since the statute now punishes assault on an officer "while engaged in" the performance of his duties, it reflects, we believe, a Congressional purpose to make the *McNabb* result with respect to killing applicable to assaults as well. This, we think, is one of the changes in "substance" to which the reviser referred. It is true that,

after the 1948 revision, the Fifth Circuit held otherwise, with respect to a charge of assault in *Hargett* v. *United States*, 183 F. 2d 859, 864–865, and *Hall* v. *United States*, 235 F. 2d 248. As the court below points out, however, in its most recent decision on the subject, *Bennett* v. *United States*, 285 F. 2d 567, certiorari denied, 366 U.S. 911, the Fifth Circuit has indicated that it now accepts the view that knowledge of the federal character of an officer is not a necessary element of the offense. The other decisions which petitioners claim to be in conflict with the decision below do not relate to this statute, but to obstruction of justice and bribery, and hence involve different considerations.

2. Petitioners' other attacks upon the sufficiency of the evidence are equally without merit. Contrary to their assertion (Pet. 16–19), the fact that Foley was not investigating any particular federal crime at the time he was assaulted does not mean that he was not engaged in the performance of official F.B.I. duties. The detection and investigation of specific violations of federal law is not the F.B.I.'s only task; its Division of Identification and Information is responsible for "acquiring, collecting, classifying, and preserving criminal identification and other crime records * * *." 5 U.S.C. 340. To this end, it is proper for the F.B.I. to conduct intelligence-like activities in order to obtain information and knowledge about the underworld for possible future use. It is clear that Agent Foley was directed by his superior to perform intelligence operations at the funeral in question and was

actually performing those official duties at the time he was assaulted. This Court has said, in an analogous context, "To constitute it official action, it was not necessary that it should be prescribed by statute: it was sufficient that it was governed by a lawful requirement of the department upon whose authority the officer was acting. * * * In numerous instances duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the provisions of the * * * statutes." *United States* v. *Birdsall*, 233 U.S. 223, 230–231.[2]

3. Various claims of error at the trial are without substance.

(*a*) *Admission of Foley's gun.*—Petitioners argue (Pet. 24–26) that Foley's gun, which was retrieved from the church after being pointed out by John Lombardozzi, should not have been admitted in evidence because it had no probative value with respect to the assault. The evidence did show, however, that Foley's gun was missing from its holster on his person, that it was found inside the church, and that the gun could have been the instrument by which Foley's skull was injured. The weapon was thus connected with the crime charged and properly admitted in

[2] Petitioners' reliance upon *Whipp* v. *United States*, 47 F. 2d 496 (C.A. 6), and *Kellerman* v. *United States*, 295 Fed. 796 (C.A. 3), is misplaced. In *Whipp*, the evidence showed that the Department of Agriculture employee in question was not performing federal duty. In *Kellerman*, the court ordered dismissed a bribery indictment which failed to allege that the recipient of the bribe was an officer of the United States.

evidence. *Banning* v. *United States,* 130 F. 2d 330, 335 (C.A. 6), certiorari denied, 317 U.S. 695.[3]

(b) *Limitation of defense cross-examination of a government witness.*—At the trial, government counsel told the court that he did not want the defendants to know where a particular government witness was living (Vol. I, 37). When the court agreed to this, defense counsel said that it was "all right" and that the matter was "unimportant" (Vol. I, 37–38). Subsequently, the court sustained a government objection to a question seeking to elicit from the witness the name or address of his employer (Vol. I, 38). The ruling was a proper exercise of discretion, since disclosure might have subjected the witness to personal danger or harassment.[4] See *Alford* v. *United States,*

[3] In *Brubaker* v. *United States,* 183 F. 2d 894 (C.A. 6), upon which petitioners rely, loaded guns found in a suitcase were not shown to have any connection with the offense charged, the theft of a car.

[4] Subsequent events showed that these were not empty fears. In February 1964, petitioners moved under Rule 33, F.R. Crim. P., for a new trial based on newly discovered evidence, alleging that they had obtained a tape-recorded and allegedly voluntary recantation of this witness' trial testimony. At the hearing on the motion, the witness in question testified that he had recanted his testimony because of harassment and fear for his life. Petitioners thereafter withdrew the motion. Subsequently, four of the petitioners, the acquitted co-defendant Anthony Lombardozzi, and trial counsel for two petitioners were indicted for obstructing justice in the instant case, in violation of 18 U.S.C. 1503.

On May 21, 1964, an important defense witness pleaded guilty to perjury committed in the course of his testimony in the instant case.

282 U.S. 687; *United States* v. *Rich*, 262 F. 2d 415 (C.A. 2); *United States* v. *Easterday*, 57 F. 2d 165 (C.A. 2), certiorari denied, 286 U.S. 564. The record shows that the trial court allowed defense counsel wide latitude in cross-examining this witness as to all other aspects of his life, including his current and past occupation as a bouncer in night clubs, the name of his former employer of some six weeks before trial, and his reliability in paying his bills (Vol. II, 139–141, 144–145).

(*c*) *Refreshing the recollection of government witness.*—Government witness Biagio Ferraioli testified that on April 3, 1963, he drove one of the limousines in the Lombardozzi funeral; that he saw somebody "throwing a kick at some man"; that two men ran inside the church with guns in their hands; and that "everybody disappeared" (Vol. II, 41–42). When asked whether he could identify anyone that rode in his limousine out to the cemetery, Ferraioli vacillated and subsequently identified George Lombardozzi (Vol. II, 42–43). Government counsel then showed Ferraioli a photograph, and Ferraioli testified that no one told him the name of the person whose photograph was before him (Vol. II, 44–45). Ferraioli testified that Marino made a remark inside the limousine but, when asked to identify the man, Ferraioli identified Zampello (Vol. II, 45–47). The court, which characterized Ferraioli as an "unwilling witness" (Vol. II, 51), allowed government counsel to show Farraioli the photograph again and question him about a prior identification of the person in the photograph. Ferraioli

admitted that his recollection was refreshed and identified Marino as the person who remarked that he had hit the agent with two punches (Vol. II, 52–54).

Later in the trial, government witness Ramsey, an eye-witness to the assault, identified petitioners Marino, Zampello and George Lombardozzi as assailants (Vol. II, 88–90). When asked whether she had seen anyone else, Mrs. Ramsey at first replied in the negative (Vol. II, 90). When government counsel showed her some photographs, however, she admitted that she had identified the persons in the photographs to the FBI on April 11, 1963 (Vol. I, 28–30; Vol. II, 91–94). She then identified petitioners John and Camillo Lombardozzi as assailants, explaining that her previous failure to name other assailants was due to uncertainty (Vol. II, 94, 95).

The procedure thus permitted—as applied in one case to a hostile, and in the other to an elderly, witness—lay well within the discretion of the trial court. See *e.g.*, *Wheeler* v. *United States*, 211 F. 2d 19 (C.A.D.C.) certiorari denied, 347 U.S. 1019; *United States* v. *Allied Stevedoring Corp.*, 241 F. 2d 925 (C.A. 2), certiorari denied, 353 U.S. 984; *United States* v. *Riccardi*, 174 F. 2d 883 (C.A. 3), certiorari denied, 337 U.S. 941.

(d) *Adverse newspaper publicity.*—At the outset of the trial, the court cautioned the jurors against reading or listening to comments about the case (Vol. II, 2). On the following morning, Juror No. 4, in response to the court's inquiry, said that he had just begun to read about the case in the newspaper and had

stopped (Vol. II, 7). He said that he "didn't know what [he] was reading," and that the occurrence would not influence him or prevent him from being impartial (Vol. II, 7). On the following day, in response to questioning by the court, Jurors Nos. 10 and 12 said that they had read an article about the case, but that they were not influenced thereby and could still be fair and impartial (Vol. II, 58–59). The court then admonished the jury "to avoid these newspaper reports about this case" (Vol. II, 59). The court repeated this admonition in substance throughout the remainder of the trial (Vol. II, 85, 100, 115, 121, 158, 173, 181, 195, 204, 230, 235). At the conclusion of the trial, petitioners refused the court's offer to question the jurors on the subject of recent adverse newspaper publicity (Vol. II, 235–236). In its instructions, the court charged that the government bore the burden of proving guilt beyond a reasonable doubt; that the jury was the sole judge of the facts in the case; and that the facts or evidence consisted of the testimony of the witnesses, the facts as stipulated and the exhibits received into evidence (Vol. I, 53, 57). The court reminded the jury of the admonitions it had given regarding outside influences and of the jury's assurances that those instructions would be obeyed (Vol. I, 53). In these circumstances, the steps taken by the court to prevent prejudice to the defendants were entirely adequate. See *United States* v. *Agueci*, 310 F. 2d 817, 831–832 (C.A. 2), certiorari denied *sub nom. Guippone* v. *United States*, 372 U.S. 959.

4. During the government's closing argument to the jury, the prosecutor remarked (Vol. I, 45), "And where is Carmine Lombardozzi? Could the government have brought forward Carmine * * *." When defense counsel objected, the court stated that the defendants were not required to call any witnesses (Vol. I, 45). At the conclusion of a bench conference on this subject, the court instructed the jury that both sides had the right to call witnesses as they saw fit, but that the defendants were not required to call any witnesses or to prove their innocence (Vol. I, 50). In its instructions to the jury, the court charged that statements made by counsel in support of objections or in summation were not evidence in the case; and that the jury was obliged to accept the court's rulings made during the trial and in the court's instructions (Vol. I, 54).

There is no substance to petitioners' contention that the prosecutor's remarks concerning Carmine Lombardozzi were "improper and inflammatory." Since the prosecutor was cut short on this subject by defense objections, the remarks in question, as the court below correctly held (Pet. App. 51), "cannot by the most speculative inference be twisted into an accusation that appellants were derelict in not producing and calling him." Moreover, even if it could be said that the remarks were improper, the court's prompt and correct instructions to the jury on the matter of producing witnesses would have cured any defect on this score.

CONCLUSION

For the reasons set forth, we respectfully submit that the petition for a writ of certiorari should be denied.

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